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PUBLIC PROSECUTOR

v.

RAYMOND CHIA KIM CHWEE & ANOR. & ANOTHER CASE

FEDERAL COURT, KUALA LUMPUR

SALLEH ABAS LP

b

WAN SULEIMAN FJ

HASHIM YEOP SANI FJ

[CRIMINAL REFERENCE NO. 2 OF 1983]

7 JUNE 1985

c

CRIMINAL LAW AND PROCEDURE: *Reservation of questions of law for Federal Court-Meaning of "order" s. 307(i) of Criminal Procedure Code - Whether decision or order to issue a summons under s. 51 of Criminal Procedure Code is a final order - Whether defence entitled to inspect and take copies of documents in possession of prosecution - Revisionary powers of High Court Judge.*

In this case, five questions of law were reserved for the decision of the Federal Court, viz:

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(1) Does an appeal lie to the High Court from an order made by a Subordinate Court under s. 51 of the Criminal Procedure Code?

(2) Does a person accused of an offence before a Subordinate Court have a right to apply for and obtain an order under s. 51 of the Criminal Procedure Code to inspect and take copies of documents in the possession of the respondent in connection with or in respect of such offence?

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(3) If the answer to question (2) is in the affirmative, then what are the documents which the accused is entitled to inspect and take copies of?

(4) If the answer to question (2) is in the negative, then:

(a) does an accused person have a right to inspect and take copies of such documents as aforesaid?

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and

(b) what is the nature and extent of such right?

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(5) Having ruled that s. 51 of the Criminal Procedure Code is not applicable, will it be right in law for the learned Judge to order the prosecution to supply to the defence before trial photo copies of the documents referred to in the charge, the contents of which form part of the evidence for the prosecution?

Held:*h*

[1] The word "order" in s. 307(i) of the Criminal Procedure Code ("the CPC") is a final order in the sense that it is final in its effect as in the case of a judgment or a sentence. A decision or order to issue a summons under s. 51 of the CPC is a final order in the sense that it is final in its effect and therefore appealable under s. 307(i) of the CPC.

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[2] It is quite plain that an application under s. 51 of the CPC may be made before the commencement of a trial or in the course of a trial. In exercising its discretion under this section, the Court has to consider the justice of the case and at what stage of the proceeding the application is made. A general demand for unspecified documents should not be entertained.

[3] Where the Court is asked to exercise its discretion under s. 51 of the CPC before the commencement of trial, the Court must have regard to ss. 152, 153 and 154 of the CPC relating to the framing of the charge. The prosecution has a specific duty to particularise the charge sufficiently so as to give adequate notice to the accused person and to enable him to prepare his defence. So long as this requirement is satisfied, the law is satisfied. The Court should not exercise its discretion so as to enable the accused to gain access to materials before the trial as in the case of pre-trial discovery and inspection of documents in a civil proceeding.

[4] Where the application under s. 51(i) of the CPC is made in the course of the trial, the rule of relevancy must be strictly enforced. The materials or documents asked for must be relevant to the issues for adjudication.

[5] The terms of the order made by the learned Judge (see [1983] 1 CLJ 321) would seem to be a contradiction in terms. It was neither an alteration nor a reversal of the order made by the learned President and therefore not authorised under s. 316(c) of the CPC. The order was therefore not a proper exercise of the revisionary powers of the learned Judge.

Cases referred to:

Mohd. Amin Bros. v. Government of India [1950] AIR 37 Fed Ct 7

PP v. Hoo Chang Chwen [1962] 28 MLJ 284

PP v. R.K. Menon & Anor. [1978] 2 MLJ 152

Syed Abu Bakar bin Ahmad v. Public Prosecutor [1982] 2 MLJ 186

Public Prosecutor v. Teoh Choon Teck [1963] 2 MLJ 35

Haji Abdul Ghani v. Public Prosecutor [1980] 2 MLJ 196

Anthony Gomez v. Ketua Polis Daerah, Kuantan [1977] 2 MLJ 24

Khoo Siew Bee & Anor. v. Ketua Polis, Kuala Lumpur [1979] 2 MLJ 49

Ganga Ram v. Habib Ullah & Anor. [1936] AIR Allahabad 212

Legislation referred to:

Criminal Procedure Code, ss. 51, 51(i), 129(i)(b), 152, 153, 154, 307(i), 316, 316(c)

Penal Code, ss. 467, 471

Other Sources referred to:

Mallal's Criminal Procedure

For the public prosecutor - Mohtar Abdullah, DPP

For the respondents - G. Sri Ram (Balasingam and T. Dana with him); M/s. Joseph & Sons and M/s. Morris Edgar & Clough Thuraisingam

JUDGMENT

Hashim Yeop Sani FJ:

Five questions were posed before us in two separate Notices of Motion - one from the Public Prosecutor and four from Zainal bin Hj. Ali in the other Notice of Motion. The questions are:

- (1) Does an appeal lie to the High Court from an order made by a Subordinate Court under s. 51 of the Criminal Procedure Code?
- (2) Does a person accused of an offence before a Subordinate Court have a right to apply for and obtain an order under s. 51 of the Criminal Procedure Code to inspect and take copies of documents in the possession of the respondent in connection with or in respect of such offence?
- (3) If the answer to question (2) is in the affirmative, then what are the documents which the accused is entitled to inspect and take copies of?

- a** (4) If the answer to question (2) is in the negative, then:
- (a) does an accused person have a right to inspect and take copies of such documents as aforesaid?
- and
- (b) what is the nature and extent of such right?
- b** (5) Having ruled that s. 51 of the Criminal Procedure Code is not applicable, will it be right in law for the learned Judge to order the prosecution to supply to the defence before trial photocopies of the documents referred to in the charge, the contents of which form part of the evidence for the prosecution.

Question No. (5) is the Public Prosecutor's question.

- c** For convenience s. 51 of the CPC is reproduced which reads as follows:
- 51.(i) Whenever any Court or police officer making a police investigation considers that the production of any property or document is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer such Court may issue a summons or such officer a written order to the person in whose possession or power such property or document is believed to be requiring him to attend and produce it or to produce it at the time and place stated in the summons or order.
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- (ii) Any person required under this section merely to produce any property or document shall be deemed to have complied with the requisition if he causes such property or document to be produced instead of attending personally to produce the same.
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- (iii) Nothing in this section shall be deemed to affect the provisions of any law relating to evidence for the time being in force or to apply to any postal article, telegram or other document in the custody of the postal or telegraph authorities.

- f** With regard to the first question, under s. 307(i) of the Criminal Procedure Code any person dissatisfied with any judgment, sentence or order pronounced by any Magistrate's Court in a criminal case to which he is a party may appeal to the High Court against any such judgement, sentence or order. The word "order" is preceded by the words "judgment" and "sentence". The order must therefore be a final order in the sense that it is final in its effect as in the case of a judgment or a sentence. The test for determining the finality of an order is to see whether the judgment or order finally disposes of the rights of the parties. See some discussion on this point in *Mohd. Amin Bros. v. Government of India* [1950] AIR 37 Fed Ct 7 in respect of civil suits. The right of a person to ask for a document or other material in a criminal proceeding under s. 51 of the CPC is a right exercisable at the discretion of the Court. Thus a decision or order to issue a summons under s. 51 of the CPC is a final order in the sense that it is final in its effect and therefore appealable under s. 307(i) of the CPC. It is distinguishable from a purely "procedural" ruling as described in *PP v. Hoo Chang Chwen* [1962] 28 MLJ 284 and *PP v. R.K. Menon & Anor.* [1978] 2 MLJ 152. In the former case Rose CJ of Singapore dealt with an appeal on the admissibility of certain statements and the learned Judge held that the ruling of the Magistrate was a procedural ruling and therefore not an appealable order. In the latter case Ajaib Singh J also took the view that a ruling on a point of law relating to non-compliance with s. 129(i)(b) of the CPC was a procedural and non-appealable ruling.

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We can come now to the second, third and fourth questions which can be dealt with together. The appeal before the learned Judge was against the order made by the learned President in favour of the respondent, Zainal bin Hj. Ali for the Public Prosecutor to deliver to the said respondent documents for his inspection namely documents specifically referred to in the charge and also documents removed by the prosecution from the possession of the applicant. The grounds for the appeal were that the application by the respondent did not mention under what law it was made and alternatively if it was made under s. 51 of the CPC the learned President erred in law in allowing the application purporting to be for the purpose of enabling the respondents to prepare their defence when the total effect of the order was to enable the defence to gain access to materials which were evidence by which the prosecution proposed to prove the charge. The learned appellate Judge allowed the appeal but purporting to exercise his revisionary powers made an order allowing the first part of the order of the learned President to remain. The question which also arises is whether the learned Judge was correct to invoke his revisionary powers after the disposal of an appeal under s. 316 of the CPC.

Section 51 of the CPC is a general provision to be invoked at any stage of an inquiry, investigation or trial or other proceeding under the Code. From the language it is plain that section enables the Court or police officer, as the case may be, if it or he considers that the production of any document or material is necessary or desirable to issue, a summons (in case of the Court) or a written order (in the case of the police officer) to the person in whose possession or power the material or document is believed to be requiring such person to attend and produce the material or document at the time and place as stated in the summons or written order. The first thing to note is that the problem posed before this Court arose out of a criminal proceeding for an offence of forgery under ss. 467 and 471 of the Penal Code and therefore the Court which must consider whether the production of the material or document asked for is necessary or desirable is the Court before which the trial was pending or in which the trial was proceeding.

The appellate Judge in his Judgment said:

The word ‘person’ is defined under the Interpretation Act, 1967 to include a body of persons, corporate or unincorporate. Thus, s. 51(i) envisages a summons to be issued by the Court against any person (including the Public Prosecutor) to produce specified documents when it considers that the production of such documents is necessary or desirable for any of the purposes stated in that section. I agree with Seah J in *Syed Abu Bakar bin Ahmad v. Public Prosecutor* [1982] 2 MLJ 186 @ 187 that s. 51 should be construed strictly. Although it appears to be so, that Section is not intended to enable the defence in a criminal proceeding to ask for discovery of documents or inspection of documents from the prosecution before trial.

Further down in his judgment he also said:

In the instant case, no summons had been issued, and on the facts no summons could have been issued, as the application was in too general a form in the case of Raymond Chia, and too all-embracing in the case of Zainal. So much so that they were in the nature of interlocutories or discovery of documents for which s. 51 is never intended.

We were urged that the vital factor in this reference is the distinction drawn between what is labelled as the “strict” approach taken by Seah J (as he then was) in *Syed Abu Bakar bin Ahmad* and the apparent “liberal” approach envisaged in *Mallal’s Criminal Procedure* where the author said that “anything which may reasonably be regarded as forming part of the

- a* evidence in the case may be ordered to be produced and that is the primary object of these provisions” which approach would (it was urged) seem to have found favour with Hepworth J in *Public Prosecutor v. Teoh Choon Teck* [1963] 2 MLJ 35 and Wan Yahya J in *Haji Abdul Ghani v. Public Prosecutor* [1980] 2 MLJ 196. We are of the view however that for practical purposes there is really no such distinction. From the language of the Section (**“necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding”**) it is quite plain that an application under that Section may be made before the commencement of a trial or in the course of a trial. In exercising its discretion under s. 51(i) of the CPC the Court has to consider the justice of the case and at what stage of the proceeding the application is made.

- c* Where the Court is asked to exercise its discretion under s. 51 of the CPC before the commencement of trial the Court must have regard to the provisions of ss. 152, 153 and 154 of the CPC relating to the framing of the charge. There is clearly a specific duty imposed on the prosecution to particularise the charge sufficiently so as to give adequate notice to the accused person. The entitlement of the accused under s. 51 of the CPC to any document or copies of document or other material in the possession of the prosecution is entirely at the discretion of the Court having regard to the justice of the case. The discretion should not however be exercised so as to enable the accused to gain access to materials before the trial as in the case of pre-trial discovery and inspection of documents in a civil proceeding. The accused in a criminal trial should have sufficient notice of what is alleged against him so as to enable him to prepare his defence. So long as that requirement is satisfied the law is satisfied. This principle of justice was in fact emphasised by Hepworth J in *Public Prosecutor v. Teoh Choon Teck* at p. 35 where he said:

- e* If there be any one principle of criminal law and justice clearer and more obvious than all others, it is that the offence imputed must be positively and precisely stated, so that the accused may certainly know with what he is charged, and be prepared to answer the charge as best he may.

The qualification however is also stated by the learned Judge in the same page with which we respectfully agree:

- f* It will be observed that nowhere do ss. 162, 163 and 164 say that the accused person is entitled to know the means by which the prosecution proposes to prove the facts alleged in the charge.

- g* Where the application under s. 51(i) of the CPC is made in the course of the trial, the rule of relevancy must be strictly enforced. We feel that this is what *Mallal's Criminal Procedure* meant by saying that “anything which may reasonably be regarded as forming part of the evidence in the case may be ordered to be produced and that is the primary object of these provisions.”

- h* If the discretion is to be exercised before the commencement of trial the Court cannot anticipate how the prosecution will proceed. In other words the Court would not be justified to direct the prosecution to deliver to the accused all documents taken from him for that will not be a correct exercise of the discretion under s. 51 of the CPC. In the first place the accused should know what documents had been taken from him and to say that unless such documents were delivered for his inspection he would not be able to adequately prepare his defence cannot be a true proposition. A general demand for unspecified documents should not likewise be entertained. See *Anthony Gomez v. Ketua Polis Daerah, Kuantan* [1977] 2 MLJ 24 and *Khoo Siew Bee & Anor. v. Ketua Polis, Kuala Lumpur* [1979] 2 MLJ 49 for another basis for the inspection and supply of the first information report and cautioned
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statement. Under s. 51 of the CPC the accused is most certainly entitled to have copies of documents which are specified in the charge. But the accused cannot be expected to be given access to all documents whatsoever taken by the police during investigation. In respect of application made in the course of the trial the materials or documents asked for must be relevant to the issues for adjudication.

The last question is whether it was proper for the appellate Judge to make a fresh order after setting aside the order under s. 51 of the CPC which he held had not been properly applied for. Why the appellate Judge decided to do so is explained in that part of his judgement which reads as follows:

Be that as it may, having pursued the appeal record, I am of the view this is a proper case where I should exercise the Court's power of revision in order to ensure that justice is not only done but seen to be done. To my mind the charge as it stands is insufficient to enable the applicants to properly prepare their defence.

He also gave the reasons why it would be just and proper for the prosecution to furnish the accused with photostat copies of documents specifically referred to in the charge.

Was the appellate Judge here invoking his "inherent jurisdiction" referred to in *Ganga Ram v. Habib Ullah & Anor.* [1936] AIR Allahabad 212 to call upon a person present in Court (in this case the DPP) to produce the document? In this case the appellate Judge had already ruled that the respondent's application was not properly made under s. 51 of the CPC and therefore the order of the learned President should be set aside. The only question is whether it was a proper exercise of the revisionary powers of the appellate Judge.

Having regard to our view of s. 51 of the CPC the terms of the order made by the learned Judge would seem to be a contradiction in terms. We agree with the learned Deputy that what the learned Judge did was not correct; it was neither an alteration nor a reversal of the order made by the learned President and therefore not authorised under s. 316(c) of the CPC. We are of the view therefore that the order of the learned Judge to produce the documents was not a proper exercise of his revisionary powers.

Therefore our answers to the questions posed are as follows:

- (1) The answer to question No.1 is in the affirmative.
- (2) The answer to questions No.2 and No.3 is in the affirmative with a qualification, that is, an accused person has a right to apply for a summons under s. 51 of the CPC but the issue of the summons is at the discretion of the Court before which the enquiry or trial is heard or pending. Where the application is made before the commencement of enquiry or trial as a general rule the documents or materials must be documents or materials specified or referred to in the charge. A general demand for unspecified materials or documents should not be entertained. Where the application is made in the course of inquiry or trial the Court has to consider the question of relevancy to the issues for adjudication.
- (3) Since the answer to question No.2 is in the affirmative, question No.4 need not be answered.
- (4) The answer to question No.5 is in the negative not because the contents of the documents formed part of the evidence of the prosecution but because the order made by the appellate Judge was not a proper exercise of his revisionary powers.

Also found at [1985] 2 CLJ 457

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